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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Z. T., a Person Coming Under the  
Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

S. T.,

Defendant and Appellant.

B216156

(Los Angeles County  
Super. Ct. No. CK71246)

APPEAL from an order of the Superior Court of Los Angeles County,  
Donna Levin, Referee Presiding. (Pursuant to Cal. Const., art. VI, § 21.) Order is  
reversed and remanded.

Lee Gulliver, under appointment by the Court of Appeal, for Defendant and  
Appellant.

James M. Owens, Assistant County Counsel, and Timothy M. O’Crowley for  
Plaintiff and Respondent.

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In this dependency matter (Welf. & Inst. Code, § 300 et seq.)<sup>1</sup>, S. T., a mother of minor children who were adjudged dependents of the juvenile court (Mother), challenges a visitation order made for one of the minor children when the court terminated its jurisdiction over the minor at a section 364 review hearing. Mother contends she did not receive proper notice of the hearing. She also contends the trial court erred when it did not afford her a hearing on issues relating to visitation with the minor. We find Mother's contentions have merit and we will reverse the order terminating dependency court jurisdiction over the minor child and the visitation order and remand the case for further proceedings.

### ***BACKGROUND OF THE CASE***

#### *1. Detention of the Minors*

##### *a. Detention Report*

When this case was instituted Mother had two children. Her son Z.J. (Son) was nearly six years old when the section 300 petition was filed on January 9, 2008. His father is M.J. Mother's daughter Z.T. (Daughter) was 13 months old at that time. Her father is C.J. (Father). The record indicates Son was "born with drug exposure while mother was pregnant."

The social services agency is the Los Angeles County Department of Children and Family Services (the Department). A referral the Department received in December 2007 that alleged that Son was the victim of Mother's general neglect and physical and

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<sup>1</sup> Unless otherwise indicated, all references herein are to the Welfare and Institutions Code.

emotional abuse, and Daughter was at risk because of the alleged abuse of Son, her sibling. The family has a history with the Department. A referral in August 2003 alleged Mother's general neglect of Son. The allegation was determined "inconclusive." An October 2003- alleged Son's father perpetrated a substantial risk of physical abuse towards Son. That allegation was also determined to be inconclusive. In May 2004 a referral determined that Mother was using marijuana, her home was adequate, and she was meeting with a mental health therapist monthly. A November 2007 referral alleged general neglect of Son and that allegation were pending when the December 2007 referral was made that resulted in this case being filed. A home visit for the November 2007 referral found Mother's home to be "extremely filthy," with food, papers and other items all over the floor.

The Department's detention report for the family states a social worker interviewed Mother, Son and Son's father at a police station in December 2007. Son stated he wanted to live with his father because Mother hits him in the back, hits him on the hand with a belt, punched him in the stomach and choked him. (Mother later denied those allegations.) Son's father reported that Mother disciplines Son by hitting him and using a belt on him, and allows her cousin to hit him for discipline. The father stated Mother "smokes weed all day and she allows my son to sleep in his own urine and feces." He asserted that Mother does not keep house well and does not cook for the minors. Mother stated Son "is a handful" and was acting "worse and worse." Mother admitted to hitting Son in the mouth and causing his tooth to come out. She said she hit him because he called her a "bitch." She stated that Son cusses at her and bullies her

and he has trouble behaving at school. Mother stated she was taking parenting classes at a local school. Mother had previously told another social worker that the tooth that fell out was already loose. Asked by that other social worker how she speaks to Son, Mother stated she tells him “sit your muthafuckin’ ass down and bring your muthfucking ass here.” Regarding Daughter, Mother reported that she is involved with Regional Center because “she is behind.” (The detention report states Daughter had an evaluation scheduled for January 2008 because she has “apparent developmental issues.

The minors were temporarily placed with relatives (apparently Mother’s aunt and cousin) and then placed with Mother. Mother’s toxicology report dated December 29, 2007 was positive for cannabis. Mother stated she had not been to mental health services for approximately four years because the therapist called the child protection hotline on Mother because during a session Mother allegedly revealed she used excessive physical force in disciplining Son. At a Team Decision Meeting Mother reported domestic violence against her by Son’s father and admitted that she uses foul language when addressing Son. Son’s father admitted to hitting Mother in the presence of Son and being verbally abuse towards her.

The social worker had a telephone interview with Father, Daughter’s father. He stated that overall Mother is a good parent but he is a better parent and he asked for custody of Daughter. He stated he is raising an eight-year-old with another woman. It was he who called in the incident where Mother knocked Son’s tooth out. He stated Mother was very distraught when she hit Son and knocked his tooth out. It is not clear from the Department’ report whether Mother was distraught over having knocked out

Son's tooth or she was distraught at the time when she knocked it out. He stated he was not actually in the room when Mother knocked the tooth out and he has never seen Mother hit Son or Daughter. He stated he should have called in the referral when it happened. He stated that whereas he is neat and can cook and clean, Mother is not neat and she needs to learn more about being a mother because she had no home training and family training. He said he had previously asked Mother to have Daughter live with him and she could come for Daughter for visits whenever she wants but Mother refused his request.

Although the Department's report and addendum report for the January 9, 2008 detention hearing recommended that the minors be detained in Mother's home, an "information for court officer" filed on the day of the detention hearing states the Department was detaining the children from all of the parents because of ongoing domestic violence, the children being found home alone, and the home being filthy. A reporter's transcript for that hearing shows the minors were detained when they came to court that day.

b. *Detention Hearing*

At the detention hearing on January 9, 2008, the court found that the fathers were presumed fathers of their respective children. Daughter was released to Father and family maintenance services were ordered for them and family reunification services for Mother and Son. The court found a prima facie case for detaining Son and ordered that temporary custody of him would be placed with the Department for placement in appropriate shelter care or the home of an appropriate relative, and reunification would

be given to his parents. The court indicated that it was “surprised” and “shocked” that the Department had initially released the minors to Mother. Monitored visits were ordered. A pretrial resolution conference (PRC) was set for February 6, 2008. An order staying family and probate proceedings regarding the minors (a restraining order against the father of Son and in favor of Mother, and two paternity cases regarding Son) was issued on January 11, 2008.

2. *Jurisdiction and Disposition Matters*

a. *The Report*

The jurisdiction/disposition report for the February 6, 2008 PRC shows that when interviewed for the hearing, Mother described domestic violence with Son’s father, stating he had hit her in the eye, held her hostage at his sister’s home, swung a bat at her and threatened to kill her. She provided several police reports for incidents of domestic violence. The domestic violence goes back to 2002 and there are still issues as Mother had recently obtained a restraining order against him. Mother stated she had not used marijuana since her toxicology test in late December 2007 came back positive. She stated Son’s father uses cocaine. The social worker found she had a limited ability to care for Son because her response to Son’s behavior problems was to use corporal punishment. Mother was found to have a “climate in her home that is fill[ed] with all kinds of profanity laced insults and name calling which [Son] has learned and repeats, for which he is then punished.” The report notes Mother had used the marijuana even though Mother knew she was pregnant with her third child.

Son was interviewed but did not demonstrate that he knew the difference between a lie and the truth. He was distracted and unfocused during the interview. He described domestic violence between Mother and his father, and stated he cried, his parents “screamed and screamed,” and Mother used “cuss words.” Father opined, as he had in his previous interview with the social worker, that Mother is a good mother but needs help with parenting. Mother stated she was currently participating in anger management and one-on-one counseling at Family Development Network. Son’s father denied drug use but admitted an arrest for transportation and sale of drugs. (Actually CLETS results for him show two felony convictions, both drug related.) He denied he has domestic violence issues with Mother. A non-related extended family member of Mother and Son’s father stated the father once tried to hit Mother with a hammer. She stated the parents used to leave Son with her while she had been drinking but stated she took good care of Son and was no longer drinking because of a medical condition. Son was currently placed in her home. He told the social worker he wanted to go back home. Daughter’s doctor recommended that routine chromosomal studies be conducted due to Daughter’s developmental delays and “unusual features” and that testing be done to rule out hypothyroidism. Her developmental level was six months. Son continued to use offensive language. Individual counseling for Son, and conjoint counseling with Mother when deemed appropriate, were recommended by the social worker. Daughter continued to reside with Father who was found to be appropriately caring for her and willing to provide ongoing care. He was also caring for his nine-year-old daughter 60% of the time.

The Department recommended that both Daughter and Son be declared dependent minors, with Son to be placed in the care of the Department and Daughter in Father's care under a home of parent order, and family reunification and maintenance services be ordered. At the February 6, 2008 PRC notice was found by the court to not be proper. Mother's attorney stated Mother was not receiving visits with the minors. At a January 22, 2008 restraining order hearing, the same complaint was made by Son's father's attorney.

b. *PRC, Jurisdiction, Adjudication and Disposition Hearings*

The PRC was continued to March 12, 2008. Son's father was incarcerated at that time having been arrested on an unknown felony charge. A report from the agency that was providing Mother with anger management, individual counseling and parenting classes states she enrolled on January 16, 2008, and by March 7, 2008 had completed seven sessions in each program, and was learning positive family dynamics and setting realistic boundaries for herself and family; further, she had "shown acknowledgement of the seriousness of the allegations and case issues" and "done well to engage in family activities to promote sound nurturing care for her children." A letter from the parenting component states it is a ten session course and Mother was committed and participating "greatly," and grasping the idea of positive parenting. At the March 12, 2008 hearing, it was reported that at the beginning of March Son was removed from the home of the non-related extended family member because she was no longer able to care for him due health problems. He was replaced to a foster home. Mother's attorney reported she had



not been afforded any visitation. Due to Son's father's incarceration the PRC was continued to March 21, 2008.

At the March 21, 2008 hearing the dependency petition was amended by interlineation and Mother and Son's father submitted on the amended petition. The court found the minors are persons described by subdivisions (a) and (b) of section 300 in that Mother engaged in inappropriate discipline of Son by physically abusing him, including striking his body and striking him causing his tooth to fall out, and this discipline was excessive, caused unreasonable pain and suffering, endangers his physical and emotional health and safety and well-being, creates a detrimental home environment, and places the minors at risk of physical and emotional harm. The court further found Mother and Son's father have a history of domestic violence, including violence in the presence of the minors, including the father striking Mother in the eye and attacking her with a hammer, and the violence endangers the children's physical and emotional health and safety. The court also found Mother has a history of illegal drug use, is a current user of marijuana, and in December 2007 had a positive toxicology screen for marijuana, and Son's father has a history of illegal drug use and was currently incarcerated on drug related charges, and these matters render those parents incapable of providing regular care for the minors and endanger the minors' physical and emotional health and safety and create a detrimental home environment.

The minors were declared dependents of the dependency court. Custody of Son was taken from his parents and placed with the Department for suitable placement. Daughter was placed with her father under a home of parent order and supervision by

the Department. Reunification and family maintenance services were ordered.

Monitored visits for Mother and Son's father were ordered.

Mother was ordered to have six consecutive clean drug tests and to enroll in a "complete drug program" if she missed a test or tested dirty. She was also ordered to enroll in counseling for victims of domestic violence, parenting classes, individual counseling to address case issues including anger management and depression (Mother had reported depression), and to comply with prescribed medications pursuant to her treating psychiatrist. Son's father was ordered to enroll in drug counseling and random drug testing, domestic violence and individual counseling, and parenting classes, and the Department was ordered to help him enter programs for incarcerated parents. As a non-offending parent, Daughter's father was not ordered to enroll in any programs. A section 366.21, subdivision (e) six-month hearing for Son, and a section 364 six-month hearing for Daughter, were set for September 17, 2008. Prior to those hearings psychological and psychiatric examinations of Son were ordered due to his behavior problems at his foster home and school, and his voiding of urine and feces in his bed and clothing and on the floor.

### 3. *Six-Month Review Hearings*

#### a. *Report for the Review Hearings*

According to the Department's six-month status review report Son remained placed in his foster care home where he had adjusted well and was interacting with the other children in the home. He was observed to have a close bond with the foster mother. He was being sent home from school when he used foul language and voided

his urine on himself. He was described in a foster family agency report as easily distracted and impulsive, with behavior that is challenging both in the foster home and at school in that he throws tantrums, kicks, hits, shouts, and uses profanity when his needs are not met immediately.

Mother was appropriately caring for her newborn under a Voluntary Family Maintenance case arrangement with the Department. Her therapist reported that Mother had accepted responsibility for her actions, admitted that she had been abusive and that the abuse was due to drug use and depression, and she made a goal to reunify with Son and Daughter. Mother was complying with her case plan. She submitted six consecutive clean drug tests and was no longer on random testing. She completed parenting classes and anger management/domestic violence counseling. She continued to participate in individual counseling and was also attending group counseling, and actively participating. Her residence was maintained in a suitable condition and she maintained contact with the social worker regarding her case plan, court orders and visitation. She was having weekly visits with the children. Son's foster mother and Daughter's father both stated that the visits were going well and Mother was appropriate with the minors and not exhibiting anger or using physical punishment. Mother had become more cooperative and on speaking terms with Father. Son's father had not maintained any contact with him, or with the Department.

Daughter had adjusted well to Father's home and the social worker observed positive interaction and relationship between father and daughter. Daughter was reported to be closely attached to Father, she appeared to be happy living with him, and

he was ensuring that her medical and emotional needs are being met. Father stated he would like the minor to remain in his care and the social worker opined that removing her from Father's home would be detrimental to her well-being. Father stated Daughter is attached to her nine-year-old half-sister. A Regional Center Early Interventionist was visiting the home regularly to focus on strengthening balance and control in Daughter's legs and there was a steady improvement in the child's overall balance and coordination in standing and walking, and in communicating with Father.

The Department recommended that the family reunification and family maintenance services be continued and that the children remain in their placements.

b. *Review Hearings Findings and Orders*

At the September 17, 2008 review hearings, the court found that continued jurisdiction over the minors was necessary and Mother was in substantial compliance with her case plan and had consistently and regularly visited the minors. Mother was granted overnight visits with Daughter at least twice a week, such visits to be when Son is not visiting. A 90-day progress report and hearing to assess Regional Center services, Daughter's and Son's case issues, visits, and possible placement of the minors with Mother was ordered for December 17, 2008. Daughter was referred to "full HUB medical evaluation to assess possible head malformation." A 12-month review hearing (section 366.21, subd. (f) for Son, and section 364 for Daughter) was set for March 18, 2009.

4. *The Interim Hearings*

a. *December 17, 2008*

The interim report for the December 17, 2008 progress hearing shows that the Regional Center Early Interventionist who had been coming to Father's home 10 hours a month to strengthen the balance and control in Daughter's legs had her last visit in November 2008 and Daughter was enrolled in a Regional Center pre-school which she was attending three days a week. Daughter's teacher reported Daughter has developmental delays and other issues, including issues with stature and knee strength and balance, and stated the minor randomly repeats words an adult has stated after the conversation has changed and repeats words numerous times randomly. Daughter was also reported to be more comfortable around adults than children. Nevertheless, the Department social worker personally found Daughter had made "considerable progress" in walking and balance, and language and speech development.

Mother's weekly overnight visits with Daughter were reported to be appropriate. The social worker was at Mother's home on two occasions when Daughter was visiting and the minor appeared to be happy and comfortable with Mother, asking on numerous occasions to be held by Mother and hugging Mother. Mother interacts appropriately with the minor and responds to her requests. Father reported the minor was happy when she returned to his home after her visits with Mother. Daughter continued to be closely attached to Father and happy and comfortable in his home and he was reported to be highly concerned regarding the minor's health and educational development, and ensuring that she has her visits with Mother. He stated he would be very disappointed if

the child were returned to Mother's care. The report states Mother makes considerable efforts to have visits with the minors despite having an infant child who needs her care. Mother's care of the infant continued to be appropriate and Mother remained in contact with the social worker concerning the infant's progress and medical appointments.

At the December 17, 2008 progress hearing another progress hearing was ordered for January 28, 2009.

b. *January 28, 2009*

The report for the January 28, 2009 progress hearing states Son's visits with Mother were appropriate. During the visits the social worker observed Son to be closely attached to both Mother and his caregiver and to listen to instructions from both. Because of his behavior towards his teacher and other students, it was decided to transfer him to another elementary school. Mother and Daughter's father were having altercations regarding visitation and exchange times and the social worker indicated Daughter's transportation to and from visits with Mother would be arranged to avoid the altercations.

Daughter was diagnosed with developmental delay and an eye ailment that can cause "lazy eye," and irreversible visual defects. She was referred to specialty care. Mother's unmonitored visits with Daughter continued to go well and her father reported she appears to be happy when she returns to his home but she is also hungry. Father again indicated he would be very disappointed if Daughter were returned to Mother's home. Son's father continued to make no contacts with Son and the Department. Mother's care of her infant continued to be appropriate. The Department recommended

that the children remain in their placements and Son and Daughter remain dependents of the court.

At the January 28, 2009 interim hearing, Mother's attorney observed that the social worker had not indicated, in the Department report, a schedule for Mother's visits with Daughter. The attorney stated that while there was a suggestion (apparently made prior to the court calling the case) that the parties could work out a schedule, the attorney did not think it could be worked out because the parties had already attempted and failed. The court ordered that Mother's visits would be Friday morning from 10:00 a.m. to Sunday at 5:00 p.m. Mother's attorney added that the father could bring the child to Mother's home and Mother could return her to the father's home. The father's attorney argued it was not his client's responsibility to transport the minor to Mother's home, only to make the child available for Mother. Mother's attorney replied that Mother takes public transportation and has an infant to bring with her, and he asked why it is Mother's responsibility to provide the transportation. The court remarked that the issue was "getting to become a family law matter." Mother's attorney responded: "At this point to be a family law matter in March." The court ordered that Mother would bear the transportation responsibilities for her visits with Daughter.

##### *5. The 12-Month Review Hearing*

The Department's report for the March 18, 2009 12-month review hearings for Son and Daughter indicates Son was progressing well in his foster care and at his new school although still using foul language. He still appeared to be attached to the caregiver, and had begun receiving psychotropic medication. Daughter's placement

with Father remained safe and stable and he continued to ensure that she would continue her visits with Mother and her half-siblings. Mother's care of her infant continued to be appropriate. She told the social worker she wants Daughter and Son returned to her care. Son stated he wants to be returned to Mother's home. Father indicated he wants Daughter to remain in his care. As with past review periods, Son's father had made no attempt to contact the social worker or Son through the social worker.

Father and Mother continued to have verbal altercations regarding the time frames for visitation despite the court's directive at the January 28, 2009 hearing, and Father reported that since Mother has had overnight weekend visitation with Daughter she had only exercised her weekend visitation rights every other weekend. The report does not state why Mother was not visiting weekly. Father also stated that Daughter continued to be hungry when she arrives home to his house from the visits. The ophthalmologist who is treating the minor's eye condition gave Father a prescription for eye glasses for Daughter. Father reported Daughter is eager to go to school in the morning and waits by the door for the bus to arrive to transport her there. The Department social worker stated she had observed progress in Daughter's speech development since the child began attending Regional Center pre-school. Father was reported to be eager to have Daughter continue developing appropriately and the social worker observed a "very positive" relationship between them.

The social worker opined that returning Son to Mother's care would not be in his best interest as he continues to exhibit behavioral problems at school and during some of his visits with Mother and he is progressing well in the care of his foster mother. The



worker opined that returning Daughter to Mother's care would not be in that child's best interest because she was progressing well in Father's care, he continued to ensure that the minor is seen for medical and educational visits and he ensures that Mother has visits with Daughter.

The Department recommended the dependency court's jurisdiction over Daughter be terminated with a Family Law Court order that gives Mother continued weekend overnight visits with Daughter, and that family reunification services be continued for Mother, Son and his father so that Son can be returned to a safe home with Mother.

The Department served Mother with three form notices entitled "Notice of Review Hearing" for the March 18, 2009 12-month review hearings for Daughter and Son. The first notice was served on her by first class mail on February 20, 2009. The boxes on the notice of review hearing form for "6 Month," "12 Month," and 18 Month" were not checked. Rather, the box for "OTHER" was checked. This notice informed Mother that at the hearing the court would consider the recommendation of the social worker and make an order regarding *Daughter and Son*. The notice also states that the social worker was recommending that there be "[n]o change in orders, services, placement, custody or status." The second "Notice of Review Hearing" notice identifies the hearing as a 12-month hearing for *Son*, states the court would consider the social worker's recommendation and make an order for Son, and indicates the social worker was recommending that there be "[n]o change in orders, services, placement, custody or status." This notice was served on Mother by first class mail on March 9, 2009.

Also served on Mother by first class mail on March 9, 2009 was the third notice. It identifies the March 18, 2009 hearing as an “other” hearing for *Daughter*, states the court would consider the social worker’s recommendation and make an order for *Daughter*, indicates the social worker was recommending “A change in orders, services, placement, custody or status,” and by way of explanation for that change states: “*Termination of the Court’s Jurisdiction.*” (Italics added.) As usual, the three notices indicate to Mother that she had the right to be present at the hearings with her attorney and present evidence. Thus, the original notice for Mother indicated that the social worker recommended no changes for *Daughter*, but the subsequently served notice indicated the social worker did recommend a change—termination of jurisdiction over *Daughter*.

At the March 18, 2009 12-month review hearings for Son and *Daughter*, Mother’s attorney objected to notice, saying that although the notice to Mother did indicate the social worker was recommending that the court’s jurisdiction over *Daughter* be terminated, the notice “did not properly notice a family law order.” *However, the attorney stated that “rather than having it continued merely for that, I will just set it.”* Asked what Mother was contesting on the recommended family law order, her attorney answered that Mother was “requesting placement or at least shared custody.” Asked by the court if Mother would agree to joint legal custody with sole physical custody to Father and reasonable visitation, Mother’s attorney answered that “the visitation would have to be worked out [and] unfortunately, the father is not here.” (Father had been at court earlier that morning but was ill and had left, with his attorney waiving Father’s

appearance.) The Department suggested a mediation and the court agreed, saying it would order joint legal custody. Mother indicated to the court that she has had a problem with visitation because she does not have her own vehicle and she has the infant to care for. Her attorney agreed that the visitation issue “is one of transportation” and stated he had tried to address it previously.

The court indicated it did not have to decide the transportation issue and rather, it would terminate its jurisdiction over Daughter and issue a family law order and the order would reflect the visitation schedule that was currently in place and the parents could go to Family Law Court and mediate the visitation issues. Mother’s attorney indicated that if the juvenile court did not make a transportation arrangement order then Mother would be prejudiced in Family Law Court “because it was before this court.” He added that Mother “won’t have a bus pass after this court terminates, so no, I don’t think it is appropriately addressed.” He asserted the family law order should state that Father is responsible for transporting the minor to and from her visits with Mother, and he noted that the Judicial Council form for final judgments of the juvenile court has a place on it where the court can indicate who is to provide transportation for parental visits. He added that Father has a car, Father “doesn’t have to lug around a little baby,” and after the juvenile court jurisdiction is terminated Mother will no longer have a bus pass. The court replied that it would not be fair to Father to have to provide the transportation each way.

At that point Mother’s attorney suggested that Father could drive one way. Initially the court agreed, saying: “Fine. He can drive one way. That will be in the

order.” However, when Father’s attorney argued that it would not be legal or fair to put transportation duties on Father, the court stated: “I’m not getting that detailed in this.” The court added the visitation would be the way it was currently set. Mother’s attorney objected, saying the court was required to make an exit order<sup>2</sup> sitting in the position of the Family Law Court and consider the best interest of the child in fashioning the visitation order, which would include the ability of the parties to comply with a visitation order. The court disagreed. The court stated: “[T]he court is ordering the order as it has been, as the Mother and the Father have previously agreed upon.” At that point Mother’s attorney stated that if the court were making the family law order than he would object to the notice given to Mother. The court stated that Mother’s attorney had already stated he would not contest notice. The attorney started to reply, saying that he only waived the notice objection “[i]f we were going to be having a hearing where we were going to be able,” but the court broke in and ruled that notice was proper because the notice sent to Mother stated the social worker recommended termination of jurisdiction and Mother “has been on notice that there would be a family law order

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<sup>2</sup> Section 362.4 provides for the issuance of custody and visitation orders, and protective orders if necessary, (“exit orders”) when a juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent of the court and who has not yet attained the age of 18, such as Daughter in the instant case. The exit orders are transferred to an existing family court file, or if there is no existing file relating to custody of the minor in a family law court, the orders are used to open a superior court file. Thereafter, enforcement or modification of the orders is by the superior court. (*In re Jennifer R.* (1993)14 Cal.App.4th 704, 712.)

because there's been orders in the past. They went to mediation. They went to mediation and have an agreement as to mediation.”<sup>3</sup>

The review hearing for Daughter was trailed to the next day for receipt of a juvenile court final judgment from Father's attorney, and on March 19, 2009, the court signed the juvenile court final judgment, wherein it ordered joint legal custody of Daughter to Mother and Father, physical custody and primary residence to Father, weekend visitation for Mother from Friday morning 10:00 a.m. to Sunday 5:00 p.m. with Mother to provide the transportation to and from Father's home, and termination of jurisdiction over Daughter.

Mother has appealed from the final judgment.

### ***CONTENTIONS ON APPEAL***

Mother contends she did not receive proper notice that the court would make custody and visitation exit orders for Daughter at the 12-month review hearing. She also asserts the dependency court improperly denied her request for a contested hearing on the issue of visitation.

### ***DISCUSSION***

#### ***1. Notice Requirements for Section 364 Review Hearings***

Daughter was declared a dependent child of the court but custody was not taken from her parents. Section 292, subdivision (d) provides that notices of review hearings

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<sup>3</sup> Although the trial court stated that Mother and Daughter's father had previously agreed upon the current visitation order and had mediated it, there is no indication in the record that mediation had occurred, including mediation that produced a visitation agreement that Mother would provide her own transportation for visits.

for a child who, pursuant to section 364, has been placed under the supervision of the court and not removed from the custody of his or her parent “*shall contain a statement regarding the nature of the hearing to be held and any change in the custody or status of the child being recommended by the supervising agency.*” (Italics added.) Mother asserts she was not given proper section 292 notice for the March 18, 2009 hearing. She contends that the statement in the second notice she was sent for the 12-month review hearing, whereby she was informed that the Department was recommending termination of jurisdiction over Daughter, was not sufficient to inform her that custody and visitation would be in issue at that hearing.

The Department counters that its report for the hearing did not recommend a change of custody for Daughter, nor did it recommend a change in visitation but rather it recommended a change in status (termination of dependency court jurisdiction) and such recommendation was clearly stated on the second notice sent to Mother. We disagree with the Department’s analysis.

Family Code section 3010 provides that both the mother and the presumed father of an unemancipated minor child “*are equally entitled to the custody of the child.*” (Italics added.) Thus, although Daughter had been living with Mother at the time the minor came to the attention of the Department and the section 300 petition was filed, both parents were entitled to custody of Daughter at that time. The exit order changed that custody status, giving physical custody to the minor’s father. The Department’s status review report for the 12-month review hearing states at page 21 that the Department was recommending that jurisdiction over Daughter be terminated and the

dependency court issue a Family Law Court order giving overnight weekend visitation to Mother. Implied in such a recommendation is that custody would be given to the father of the minor. Merely telling Mother in the notice of hearing sent to her that the social worker recommended “termination of the court’s jurisdiction” was clearly not sufficient notice to a layperson that custody and visitation would be at issue at the hearing. Therefore, a statement on the notice of hearing sent to Mother informing her that the court would consider such matters was necessary.

## *2. Right to a Hearing on Exit Orders*

At the review hearing Mother’s attorney voiced his objection to the adequacy of the notice but he stated that rather than have the hearing continued so that proper notice could be served, he would just seek to set the review for a contested hearing. Thus, he indicated a willingness to waive improper notice. He stated Mother was “requesting placement or at least shared custody.” Asked if Mother would agree to joint legal custody and physical custody to the child’s father, Mother’s attorney answered that visitation would have to be worked out but Father was no longer at the hearing to do that. At that point the court and attorneys discussed a variety of matters respecting custody and visitation but there was no actual hearing with testimony. Thereafter, because Mother’s concern that transportation of Daughter to and from her home for visits was not resolved to her satisfaction by the discussion between court and counsel, her attorney indicated he would renew his objection that notice to Mother had not been proper. When the court replied that Mother’s counsel had already indicated he would not pursue the matter of improper notice, counsel stated that was only “[i]f we were

going to be having a hearing where we were going to be able” and the court cut him off and made a finding that notice was proper.

Mother was entitled to proper notice. Her attorney’s willingness to forgo proper notice rather than insist on a new hearing date for which proper notice could be given was tied to her attorney’s request that a hearing be set for a future date on the issue of visitation. However, when that request for a hearing was not accommodated by the court the attorney renewed his assertion that notice was not proper.<sup>4</sup> In *In re Roger S.* (1992) 4 Cal.App.4th 25, the social services agency recommended that dependency jurisdiction be terminated at an upcoming review hearing and the existing visitation order remain in effect. At the review hearing the father of the minor child attempted to present testimonial evidence on the issue of his request for a change in the visitation order but the court ruled that the father would have to file a section 388 motion for modification. Jurisdiction over the minor was terminated and the court left in place its then-current visitation order. (*Id.* at p. 28.) The reviewing court reversed, finding that the trial court erred in not receiving the evidence sought to be presented by the father. The court stated that “[a]lthough both the family court and the juvenile court focus on the best interests of the child, the juvenile court has a special responsibility to the child as *parens patriae* and must look at the totality of the child’s circumstances. . . . The trial court here, by refusing to accept evidence relevant to the visitation order, was in

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<sup>4</sup> In her opening brief on appeal, Mother states that the matter of who would transport Daughter to and from her visits with Mother “was precisely th[e] issue which [M]other wished to address in a contested hearing before exit orders issued” but she was “prevented from presenting evidence as to why [the exit] orders should include a provision for shared visitation transportation.”



danger of issuing an uninformed order which could fail to serve the best interests of the child.” (*Id.* at pp. 30-31; accord *In re Michael W.* (1997) 54 Cal.App.4th 190, 194-196; *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 520.)

In *In re Michael W.*, *supra*, 54 Cal.App.4th 190, Division One of this court reversed exit orders and remanded the case back to the dependency court because the mother of the minor child was not given a hearing in which she sought to establish progress she made during recent counseling. Citing *In re Roger S.*, *supra*, 4 Cal.App.4th 25, the court said: “In our view, a dependency court ought to accept all the help it can get before it makes an order affecting the lives of the children and parents who appear before it, and we cannot condone a deliberate decision to impose artificial restrictions on the parties’ ability to bring relevant evidence to the attention of the court.” (*Id.* at p. 196.)

Here, Mother’s attorney seemed to indicate at the review hearing that Mother would agree to joint legal custody and physical custody to the minor’s father but “visitation would have to be worked out.” He argued, as he had at the prior hearing, that requiring Mother to provide transportation for her visits with Daughter was too great a burden because she has an infant to care for and has no vehicle of her own and must use public transportation. Although there was a lengthy discussion among the court and counsel for Mother and Father about visitation transportation, that did not take the place of sworn testimony on the issue. Nor did the *discussion between court and counsel* on that very same issue two months earlier at the January 2009 hearing take the

place of a hearing at which evidence could be presented. Mother was entitled to present evidence.

There is prejudice to both Mother and Daughter in the court's refusal to take evidence. Both are entitled to visitation orders made by a fully informed court regarding the circumstances of visitation. Mother is entitled to explain to the court why a proposed order may not be in the best of the interests of the minor because of its impact on Mother's ability to transport the minor. A negative impact would also not be in Mother's best interest vis-à-vis her relationship with Daughter. "Courts have long recognized that, in the context of dependency proceedings, a lack of visitation may 'virtually assure[] the erosion (and termination) of any meaningful relationship' between mother and child. [Citation.]" (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504.) Indeed even when a court terminates a parent's family reunification services, "[u]nless the juvenile court finds it would be detrimental to the child, visitation remains a pivotal component of the dependency scheme." (*Ibid.*)

Mother asserts she is overly burdened with having to transport Daughter to and from visits while caring for her infant. Daughter is developmentally delayed in her balance and walking abilities and thus has mobility issues; moreover, she is just barely two years old. Mother contends she cannot easily manage both children on public transportation twice each weekend. If true, the effect may be that Mother must give up visits on some weekends if she cannot find someone to care for the infant when it is time for her to pick up Daughter from Father's home or return her to his care. Additionally, there is the issue whether the weather may impact Mother's ability to pick

up and deliver Daughter on the bus. Further, Mother asserts that once the juvenile court jurisdiction terminated, she would no longer be given a bus pass by the Department. The implication is that she cannot afford her own bus pass. The issue of transportation should have been set for a contested hearing as requested by Mother so that evidence on the issue of visitation transportation could be presented.

We agree with the Department that a parent's "due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147.) We also agree that "[d]ue process requires a balance" and "[t]he state's strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence." (*Id.* at p. 1146). Additionally, we agree that the court has discretion to ask for an offer of proof as a condition precedent to a contested hearing. (*In re Earl L.* (2004) 121 Cal.App.4th 1050, 1052-1053.). However, even assuming arguendo that the discussion held by court and counsel on the issue of transportation for visitation could be considered an offer of proof, we find that not permitting a hearing at which the issue of who should transport Daughter to visits with Mother could be fully addressed and Mother could explain transportation issues not being presented to the court by the attorneys was an abuse of discretion, particularly in view of the fact that merely telling Mother in the notice of hearing sent to her that the court might "terminate jurisdiction" did not give her an indication that it would be her last opportunity to explain to the dependency court why transportation should be assigned to Father and she should come to court prepared to present her own testimony (and witnesses and documentary evidence if necessary), and

prepared to discuss the matter with her attorney. The trial court thought the issue was significant enough that it told the parties to address the matter in the family law court. The Department's argument on appeal that Mother and Father only live "three and one-tenth miles apart" asserts information not presented to the trial court, and it cuts both ways since the burden claimed by Father's attorney in his client's having to drive Daughter to and from Mother's home seems smaller once miles are counted.

The dependency court's exit orders will have an effect on future custody and visitation orders made in the family court. Section 302, subdivision (d) provides that custody and visitation exit orders constitute "a final judgment and shall remain in effect after [dependency court] jurisdiction is terminated. The order shall not be modified in a proceeding or action described in Section 3021 of the Family Code unless the court finds that there has been *a significant change of circumstances since the juvenile court issued the order* and modification of the order is in the best interests of the child."

(Italics added.) Thus, exit orders remain in effect until they are modified or terminated by the superior court under those conditions. (*In re Chantal S.* (1996) 13 Cal.4th 196, 203.) Because the parent seeking to modify the exit order must demonstrate to the family law court a significant change of circumstances as well as best interests of the child, the trial court's directive to the parents that its current visitation order would be the exit order and the parents could take it up in the family law court was prejudicial to Mother. We cannot agree with the court's assertion that it did not have to decide the matter of who transports the minor for visitation with Mother.

### 3. *Reversal and Remand of the Case*

The parties disagree on whether the dependency court or the family court should conduct a hearing on the issue of transportation of Daughter to and from Mother's visits. The Department contends the case should be remanded to the family court and it cites *In re Alexandria M.* (2007) 156 Cal.App.4th 1088 and *In re John W.* (1996) 41 Cal.App.4th 961, where the courts opined that custody and visitation disputes should be settled in family court. The *Alexandria M.* court observed that the family court "has available to it counselors and evaluators with the education and training needed to assist the court in settling family controversies." (*Alexandria M.*, at p. 1096.) The court affirmed the termination of dependency court jurisdiction, reversed the custody, visitation and child support orders and remanded the case to the family court for a hearing on custody, visitation and support. (*Id.* at p. 1098.) The *John W.* court opined that "the place for a custody battle is in the family law courts" because among other things, there "the taxpayers do not have to pick up the tab for lawyers and psychologists." (*John W.* at p. 976.)

The instant case is not a custody battle. It is not really a visitation battle. We do not perceive that experts will be required to help the dependency court sort through the issues involved with transporting Daughter to and from Father's home. In *In re Michael W.*, *supra*, 54 Cal.App.4th at p. 197, the court reversed the orders of the dependency court that terminated the court's jurisdiction and provided for custody and visitation, and remanded the case back to the dependency court with directions to "hold the evidentiary hearing requested by [the mother], and to thereafter decide anew the

issues of jurisdiction, custody and visitation.” We will reverse the termination of jurisdiction and the visitation order and remand the case for a hearing on the issue of visitation transportation.

#### 4. *Conclusion*

It is clear why Mother does not ask us to reverse the trial court’s custody order. From the very beginning of this case Father met his parental obligation when Daughter needed a parent’s love and care and, from the time she was placed in his care at the court’s January 9, 2008 detention hearing, he has met her needs and given her a stable home. The reports do not state concerns about his care of Daughter, only positive comments. He sees to her daily care, to her medical and developmental needs, and to her education. This developmentally delayed child has made significant progress in his home. She is attached to him and he is to her. She attends the Regional Center preschool in his area of the County. And despite disputes with Mother, he does not stand in the way of Mother’s weekend overnight visits with Daughter except perhaps with respect to Mother’s assertion that he should be the person who provides the transportation for the visits.

Thus, 14 months after Daughter was placed in Father’s care, the court had good reason to find that the child’s care and custody could be transferred to the family court under the custody order. Although Mother continued to state her desire to have Daughter (and Son) returned to her care, Mother has her newborn to care for, and Daughter has various medical, developmental and education needs, including transporting her to various appointments, which would take time away from Mother’s

care of her youngest child, and apparently would require bus rides to Daughter's appointments. Further, Son's visits with Mother understandably would add another layer of stress to Mother's home. However, the record clearly shows that Mother has made great strides toward being the parent she wishes to be. She complied with her case plan. She acknowledged her part in causing the minors to be detained by the dependency court. She is caring appropriately for her infant child and the social worker finds she is appropriate with Son and Daughter during visits with her. She is to be commended for her positive decisions on behalf of her children since this case was filed.

***DISPOSITION***

The dependency court's order terminating jurisdiction over Daughter and its visitation order for Daughter are reversed and the cause is remanded to that court with directions to hold the evidentiary hearing requested by Mother, and to thereafter decide anew the issues of visitation and jurisdiction.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.